Supreme Court, U.S.
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No. _____

The Supreme Court of the United States

JOSEPH C. CAMPA, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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80 pp

Questions Presented

1. When statutes require findings and recommendations by a majority of the members of a board and then a unanimous certification of the result, does deference to an agency interpretation that precludes knowing findings, recommendations, and certifications exceed the bounds of Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

2. Does Chevron contemplate deference to an agency interpretation of one statute that renders another statute utterly meaningless?

3. Does longstanding precedent that decision-makers must consider the evidence (Morgan v. United States, 298 U.S. 468 (1936)) require that board members have some knowledge of the candidates about whom findings and recommendations are being made?

4. When a board is sub-divided into autonomous panels, does expecting panel members to approve the results of other panels without knowing what those results are, or how they are reached, conflict with longstanding precedent that "[a]pproval ... presuppose[s] the existence of some actual knowledge of the prior action?" Williams v. Vreeland, 250 U.S. 295, 299 (1919)

5. Can the statutory requirement that members certify that the best qualified candidates are being recommended be satisfied if the board members do not consider all the candidates, and not know who is being recommended or how they were identified?

6. May approval and certification be derived from acts that the actors did not intend to have those effects?

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In the Supreme Court of the United States

JOSEPH C. CAMPA, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

This case is about whether military officers who dedicate their lives to defending and protecting this nation's rule of law are entitled to a fair reading and reasonable application of its laws.

Official Citations

The Court of Federal Claims dismissed Petitioners' complaint in Campa *et al.* v. United States, 50 Fed. Cl. 300 (2001). This decision was affirmed by the Court of Appeals for the Federal Circuit in Campa *et al.* v. United States, 300 F.3d 1361 (Fed. Cir. 2002).

Jurisdiction

Judgement was entered by the Federal Circuit on August 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions

10 U.S.C. § 616(c):

A selection board convened under §611(a) of this title may not recommend an officer for promotion unless -
(1) the officer receives the recommendation of a majority of the members of the board; and
(2) a majority of the members of the board finds that the officer is fully qualified for promotion.

10 U.S.C. § 617(a):

Each selection board convened under §611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under §615 of this title, and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned among those officers whose names were furnished to the selection board.

Statement of the Case

The basis for jurisdiction in the Court of Federal Claims was 28 U.S.C. § 1491, the "Tucker Act." The right to military pay is a function of statute. 37 U.S.C. § 204; Bell v. United States, 366 U.S. 393 (1961). Active duty personnel have a right to be paid until their entitlement to that pay is properly terminated by a valid separation from active duty. Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979) (*en banc*). If an officer is not lawfully separated, his

entitlement to pay is not extinguished and the Tucker Act provides a vehicle for its recovery. Adkins v. United States, 68 F.3d 1317, 1327 (Fed. Cir. 1995).

Officers twice considered but not selected for promotion to the next higher grade are subject to involuntary separation. See 10 U.S.C. § 632. Each Petitioner was involuntarily separated from active Air Force service for that reason. They claim that their separations were invalid, and that their rights to pay continued, because their non-selections by promotion boards that failed to satisfy the minimum procedural requirements of 10 U.S.C. §§ 616(c) and 617(a) were of no legal effect.

1. Statement of Facts

The basic mechanics of Air Force promotion board procedures have been described in a number of published decisions, [1] and will not be repeated at length here. A brief summary, nonetheless, is essential to comprehension of this Petition.

Boards that often have as many as 45 members were sub-divided into 5-member panels. The records of the officers under consideration by the entire board were divided and distributed among those panels. Each panel acted as an autonomous and independent sub-board, and received a proportionate share of the entire board's quota of officers who could be promoted.

Within each panel, each member secretly assigned a numerical score between 6 and 10, in ½ point increments, to each record and then passed it to the next member. The administrative support staff added the 5 scores that each record received and ranked the totals, from highest to lowest, in an Order of Merit (OOM). There was a separate OOM for

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[1] E.g. Neptune v. United States, 38 Fed. Cl. 510, 512-13 (1997), aff'd, 178 F.3d 1306 (Fed. Cir. 1998) (Table), cert. denied sub nom. Small v. United States, 528 U.S. 821 (1999).

each panel. The staff then counted down from the top of each panel's OOM until that panel's quota was exhausted. When it was impossible for the staff to evenly apply a panel's quota because it ran out at a point where multiple records had the same score, the same-scored records were designated the "gray zone" and returned to the members for rescoring until they could be distinguished enough for the panel's quota to be evenly applied to its OOM.

As the records were being scored within the panels, the board president conducted a "quality review" by reviewing samplings of the results. In addition to his own personal preferences, one tool at the board president's disposal during this review was the Projected Order of Merit (POM), which was a computer-generated prediction of how each record under consideration by the board will ultimately be scored. If the board president perceived a scoring irregularity, he could direct that a record be re-scored by the same or a different panel. [2] Such re-scored records were ranked on the OOM of the panel whose score was used, and selected or non-selected accordingly.

Once the staff finalized each panel's OOM, as above, the records that scored within the quota were considered to have been recommended (selected) for promotion. The rest were deemed non-selected. The names of the candidates deemed to have been selected by each of the panels were simply combined and the cumulative result is forwarded for further processing pursuant to 10 U.S.C. § 618 along with a board report that the board members all signed.

Additional evidence not available during the litigation of earlier cases (A 20-40) shed additional light onto the inner workings of Air Force promotion boards. For

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[2] It is well worth noting that Congress has denounced as a manipulation of the process a board president's subjective authority to direct record re-scoring for reasons other than to break ties. S. Rep. No. 102-482, *Report on the Conduct of Proceedings for the Selection of Officers for Promotion in the U.S. Air Force*, 102nd Cong., 2nd Sess. (1992) at 16.

example, each panel member's role was strictly limited to secretly scoring individual records. A 26. They played no role in the addition of scores, the ranking of candidates, or the identification of selectees. Board presidents' "quality review" discretion allowed them to have records re-scored (and re-re-scored) by the same or a different panel and then choose the score that was "in line with **his** perception" and "comport[ed] with **his** opinion." A 34-35 (emphasis added). Moreover, board members were not briefed about the board president's "quality review" and had no way to know why any record was returned to them for re-scoring. A 31, 34. Indeed, an actual promotion board member [3] provided testimony that he never knew "what that process entailed or how this was completed." A 21. That board member testified that he never knew what scores any other members gave to records, that he never knew who had been recommended by any panel or by the board as a whole, that nothing was ever put before him for approval, and that he was not instructed that he would be approving or certifying anything by signing the board report. A 21-22. See also A 26-30.

2. The Proceedings Below

In order to appreciate the proceedings below, it is necessary to understand the legal framework within which they transpired.

The seminal case in this area is Small v. United States, 36 Fed. Cl. 43 (1996), reissued, 37 Fed. Cl. 149 (1997), aff'd, 158 F.3d 576 (Fed. Cir. 1998), amended, 180 F.3d 1343 (Fed. Cir.), cert. denied, 528 U.S. 821 (1999). Implicit in the Federal Circuit decision in Small is acknowledgement that the majority consensus required by 10 U.S.C. § 616(c) is not reached during the panel-level

[3] See Baker v. United States, 127 F.3d 1081, 1088-89 (Fed. Cir. 1997) (testimony of board member is best evidence of what is in board member's mind).

activities of the boards because no panel contains a majority of the members. Instead, Small concluded that majority consensus is reached when the collective membership approves the results of the individual panels. 158 F.3d at 581 ("'[T]here is ... no reason why the business of coming to a "majority" consensus cannot be accomplished through collective approval of the findings and recommendations of a sub-group – i.e., a selection panel.'"). It went on to hold that this approval is registered, and the required certification is made, by the single act of the board members signing the board report at the end of the proceedings. Id. ("[U]sing the signing of the Board Report as a means for the members to both express their approval of the recommended candidates and make the required certification is permissible under the statutory scheme as well.").

These holdings resulted from Chevron [4] deference to an Air Force "interpretation" of the governing statutes (id. at 580-81) that was not contained in the governing regulation or any other binding authority. See Air Force Regulation 36-89, Chapter 2 (1982) (A 41-49) (no provision for panels, no reference to consensus by approval, no mention of approval by signature); A 23-25 (unwritten procedures learned by "on the job training"). [5] At the same time, Small's holdings were based upon several fundamental premises. One was that the members were tasked to "decide whether to indorse the slate of candidates selected by the individual panels." Id. at 578. A second was that the statute does not require that members have "first-hand knowledge" of candidates' records, but only "a numerical showing that more than half of the members approved or disapproved of the matter before them." Id. at 581. The third was that a "slate of candidates" or "final

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[4] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[5] Contra Christensen v. Harris County, 529 U.S. 576, 587 (2000) (no Chevron deference to agency interpretation unless reflected in regulation or other source having "the force of law").

rankings [were] in fact approved by a majority of the members of the board." Id.

Petitioners' central contention was that Small, which had been based upon the facts then before the Court (id. at 581 ("Given the facts before us ...")), was distinguishable and untenable under the facts that they presented. They argued that board members could not recommend or approve or certify officers with **no** evidence about them or at least knowing who they were, that members could not recommend or approve or certify officers without understanding the board president's role in their identification, that no "matter" was ever put before the members for their approval, that the members were never tasked to make any decision to approve unknown officers, and, most importantly, that approval and certification could not be derived from a signature that the members did not intend to have that effect.

The Federal Circuit acknowledged the new evidence on which Petitioners relied, but summarily rejected their arguments by interpreting Small as having held that the statutes do not require any knowledge on the part of board members. 300 F. 3d at 1366.

Arguments

"We need not leave our common sense at the doorstep when we interpret a statute." Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989). Common sense tells us that Congress intended military promotion board members, like other governmental decision-makers, to know what they are doing -- and intend to do it.

1. The Plain Meaning of Statutory Language Controls

The Federal Circuit position is repugnant to the language of the statutes. Knowledge is implicit in a "recommendation" and essential to a "finding." See United States v. California, 381 U.S. 139, 165 (1965) ("our

responsibility of giving content to the words which Congress employed"). [6] In addition, Congress has stated that "Section 616(c) would require that a majority of the members of a board ascertain that all officers recommended as best qualified for promotion are also fully qualified for promotion." H.R. Rep. 96-1462, *Defense Officer Personnel Management Act*, 96th Cong., 2d Sess. (1980) at 68. It is axiomatic that board members cannot "ascertain" things without some knowledge of the subjects. An interpretation that conflicts with the plain meaning of statutory language can never be permissible.

Knowledge is, if anything, even more fundamental to a valid certification. In every known context, the act of certification contemplates a knowing and meaningful representation or assurance, rather than just a rote technicality. Indeed, 18 U.S.C. § 1350 (a highly publicized part of the recently enacted *White-Collar Crime Penalty Enhancement Act of 2002* (Pub.L. 107-204, Title IX, 116 Stat. 805-7)) makes eminently clear how meaningful and important Congress considers certifications to be. Board members' certification without knowledge of what is being certified is anathema to the plain language of 10 U.S.C. § 617(a).

2. Decision-Makers Must Consider the Evidence

Small's premise that board members need not have "first-hand knowledge" of each candidate's record (158 F.3d at 581) was not inconsistent with the idea of decisional material being "sifted and analyzed" by others before being acted upon. Morgan v. United States, 298 U.S. 468, 481 (1936). But the latest notion that board members can act with

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[6] Cf. Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177, 182 (1938) ("The language of the provision points to definitive action. ... We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect.").

no knowledge at all flies in the face of the hornbook principle that decision-makers must consider the evidence. Id. See Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 316 (1946) (no irregularity because the "record does not bear out the suggestion that either board [having the statutory duty to act] was a rubber stamp for the panel.").

3. Approval Requires Knowledge

"Approval, ratification, and acquiescence all presuppose the existence of some actual knowledge of the prior action." Williams v. Vreeland, 250 U.S. 295, 299 (1919). This principle is so fundamental that this Court considered it "scarcely necessary to say that a ratification, to be efficacious, must be made ... with knowledge of the material facts." Western National Bank v. Armstrong, 152 U.S. 346, 352 (1893). See also United States v. Beebe, 180 U.S. 343, 354 (1901) ("Knowledge of the facts is an essential element of ratification."); Winslow v. Baltimore and Ohio Railroad Co., 188 U.S. 646, 657 (1903) ("ratification must be shown to have been founded upon a full knowledge of all the facts"). [7] Under the decision below, however, board members are deemed to effect an approval with no knowledge of any material facts. Because records are distributed among panels, the members never see a majority of the ones under consideration. Because the members are not privy to the board president's actions, they cannot appreciate how officers are identified for promotion. And because they do not know what any panel has done and are never shown a list of the recommended candidates, the members are essentially signing a blank check and allowing others to decide what they have "approved." Such a radical overhaul of the principles of ratification must not be sanctioned.

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[7] To ratify something is to approve or adopt it. *Black's Law Dictionary* (4th Ed. 1968) at 1428. The words are synonyms.

4. Approval Requires Intent

Ratification and approval also require an act "and what amounts to a purpose to abide by it." Williams v. Vreeland, supra 250 U.S. at 299. See also See United States v. Chemical Foundation, Inc., 272 U.S. 1, 15-17 (1926) (valid ratification because President had knowledge of material facts and intent to ratify). Contrary to the decision below, approval and certification may not be derived from a signature that was intended as no more than a register of attendance. A 22.

5. All Statutory Provisions Must be Given Meaning

A "cardinal principle of statutory construction is to ... give effect, if possible, to every clause and word of a statute."). United States v. Menasche, 348 U.S. 528, 538-39 (1955). But under the precedent here (re-affirming Small), 10 U.S.C. § 616(c) becomes superfluous. Sections 616(c) and 617(a) contemplate two separate steps in the board process – the achievement of majority findings and recommendations and **then** a unanimous certification of the results. Since Section 617(a) requires each member to sign the board report, using their signatures as signs that they "approved or disapproved" (300 F.3d at 1365, quoting 158 F.2d at 581) is unworkable because it leaves no mechanism for registering disapproval. Divining members' approvals from their signatures renders Section 616(c) meaningless because the members' signatures automatically assure unanimous (rather than just majority) consensus every time.

Conclusion

Because "[a]dherence to established laws and regulations is necessary to ensure that the best qualified officers are selected for promotion ... the Committee [on

Armed Services] has acted through legislation, review of nominations, and oversight to ensure that the procedures used for selection boards are fair to the officer corps and are designed and conducted to select the best qualified officers for promotion." S. Rep. No. 102-482, supra at 1, 20. The legislated procedures require that boards be convened to consider officers for promotion, that a majority of the members recommend officers for promotion, that a majority of the members find that the recommended officers are fully qualified for promotion, and that the membership unanimously certify that a majority of their number is of the opinion that the recommended officers are best qualified for promotion.

That the statutes do not expressly prohibit the use of panels *per se* (300 F.3d at 1366) does not mean that any procedure incorporating panels is permissible. Panels must still be used in such a way that the members can knowingly and meaningfully satisfy their fundamental statutory mandates. An agency interpretation is manifestly impermissible, and worthy of no deference, when it merely pays lip service (at best) to those statutory mandates, and does violence to a host of venerable legal principles in the process.

Respectfully submitted,

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November 6, 2002

APPENDIX

United States Court of Appeals for the Federal Circuit

02-5017

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A. French, Michael D. Frye, David A. Frymire, Dennis Funnemark, John H. Gabbert, Francis M. Gahren, Ted A. Gallagher, Leonard R. Garcia, Joseph A. Garnett, Geoff G. Gavrilla, Alan W. Gibbs, Brian J. Giles, James A. Godard, Evelio A. Gonzalez, Michael S. Goodman, La-Goge W. Graham, Frank A. Gray, George R. Gray, Jack A. Green, Stephen Green, Jo C. Greenmyer, Richard A. Griffith, David N. Griffiths, Dale R. Gross, William Gross, Theodore F. Guild, Stephen H. Gunderson, Allan G. Hagelthorn, John Hall, David A. Hannington, Steve Hardersen, Thomas L. Harper, Judith A. Harris, Donald L. Harrison, Martin T. Harrison, Michael A. Harrison, James E. Hatcher, Patricia A. Hatcher, Justin H. Heath, Carl J. Hegedus, Craig C. Henschen, Mark D. Hensley, Bonifacio Hernandez, Dennis M. Hesse, Travis J. Hestilow, John C. Heyne, Keith A. Hicks, Gregory A. Hight, Lewis Hill, Lawrence Hill, Randall A. Hill, George W. Hodyno, Jolly Holden, Gregory W. Hood, Don W. Hoover, Phyllip B. Huffman, James D. Hughes, James J. Hughes, Waller S. Hunt, Paul B. Hurdle, Sonya M. Hutchins, Dennis N. Hutchings, Gary Jackson, Napoleon Jackson, Edward B. Janesko, Donald W. Johnson, Edward C. Johnson, Gilbert P. Johnson, Gregory S. Johnson, Eric J. Johnston, Yvan R. Jolin, Larry C. Jones, Michael N. Jones, Howard L. Joseph, Craig A. Kanske, John A. Kardach, Wade J. Kearns, Steven J. Keith, Steven R. Keller, Jeffrey L. Kiner, David L. Kipfer, Kenneth E. Kleid, Robert C. Knarr, William M. Kohnke, Kevin W. Kozlowski, Robert L. Krause, Timothy A. Krause, Jeffrey A. Krinock, John Kyriazis, Lynn R. Langer, Richard Lasky, Bertha M. Lawrence, Carol M. Laymance, Dennis A. Lee, Lonnie Leibbrand, Jeff Leknes, Peter S. Lemaire, Samuel E. Lewis, Gerald A. Livingston, Kenneth F. Long, Gordon A. Love, Donn N. Lund, James D. MacGuffie, Robert C. McCabe, Anthony A. McCoy, Steven M. McDermott, Phillip A. McDevitt, Raymond P. McDoulett, Michael T. McElhinney, David E. McGarry, David G. McGinnis, Glenn R. McGowan, James W. McLaurin, Anthony R. McPheeters,

Walter M. Mallory, Minnis V. Mansur, Joe Mariotti, Thomas S. Marshall, Richard L. Martin, Roger C. Matteson, Gail E. Matthews, Stephen F. Mature, Michael P. Mekanik, Richard Meyer, Robert C. Michel, James Miklasevich, Phillip H. Miller, Michael Miller, Robert L. Miller, Mark E. Millican, Steven L. Millican, Pamela Minton, Kenneth L. Morgan, Thomas O. Muehlenweg, Brian D. Mundt, Brian S. Murff, James C. Murphy, Kevin A. Murphy, Thomas V. Murphy, William F. Murray, Robert M. Navarro, William D. Neal, Jeffrey R. Neel, David B. Netterville, Kathleen S. Nokes, Randall A. Nordhagen, Steven W. Obendorf, Francis D. Odle, Leland D. Oliger, Barbara Osburn, John K. O'Mara, Richard J. O'Shea, Don R. Parker, John J. Paschkewitz, James G. Pasierb, Kevin M. PeGan, Robert J. Pekny, Wayne E. Perrin, Joel J. Petkovich, Lawrence E. Pfeifer, William B. Pickerill, Donald F. Pickett, Peter M. Pino, Michael K. Pomphrey, Judy Ponder, Thomas J. Pope, Carmen S. Powers, Alan D. Preisser, Raymond L. Pulsifer, Richard J. Quinnette, Terry R. Rasmussen, Roger W. Rawls, James E. Ray, Ivan D. Redford, Walter C. Reiker, John P. Reilly, Clifford A. Reinke, Joy L. Riggleman, Richard V. Robbins, Danny P. Robertson, James Robicheaux, Paul D. Romanick, William Roper, Gregory T. Rosalia, John F. Rosenbaum, Michael E. Ross, Richard R. Ross, Jessie T. Rush, Richard W. Rush, David C. Sampson, Robert M. Sampson, Troy L. Sanders, Michael J. Santi, Jose R. Santiago, John A. Schmit, William P. Schomas, Alexander D. Schramm, Donald H. Schubring, Douglas E. Sears, Calvin T. Shackleford, Bradford N. Shai, Richard C. Shaw, Stephen M. Shub, Donald B. Shull, Phillip J. Simpson, John G. Sletten, James W. Smart, Terry L. Smart, Noel M. Smith, John D. Snoddy, Reid A. Squier, Robert Alan Starks, James A. Stevens, James R. Stevens, Robert J. Stewart, JR., Terry E. Stine, Edward L. Strom, Harold C. Stuart, Peter David Summer, Leslie W. Sutton, Scott A. Swanson, James M. Takos, Iverson H. Taylor, Paul Taylor, Daniel R. Thirkill, Oatice M. Thomas, Suzanne D. Tibbs, Charles W. Tootle, Anthony B.

Torres, Melvin D. Townsend, Thomas J. Tritz, William R. Troegner, Peter Tully, Jason E. Tyler, Russell E. Valley, Michael D. Vargo, David C. Venus, Allen N. Vickrey, Karen B. Wade, Steven J. Walke, Frederick E. Watson, Kenneth C. Wells, Mark C. Weston, Russell O. Wheeler, Hugh K. Whisted, Johnston H. Wickham, Glen L. Williams, Jeffrey H. Williams, James M. Willis, Gary L. Wilson, Gerald L. Witter, David A. Wolff, Kent P. Wood, Jerry W. Woods, Terry Woods, Michael B. Wortham, Richard H. Wraith, Lewis A. Wright, William D. Wright, Joseph L. Wyllie, Peter C. Yansza, Thomas L. Yost, Roger L. Youngblood, Nick T. Zarras, and Barry M. Zetsch,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: August 9, 2002

Guy J. Ferrante, King & Everhard, P.C., of Springfield, Virginia, argued for plaintiffs-appellants.

J. Reid Prouty, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, argued for defendant-appellee. On the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director, Bryant G. Snee, Assistant Director; and Lee J. Freedman, Trial Attorney.

Appealed from: United States Court of Federal Claims
Senior Judge James F. Merow

Before MICHEL, SCHALL and LINN, Circuit Judges.

PER CURIAM.

Plaintiffs Joseph Campa and 367 other former Air Force Officers appeal from a summary judgment by the United States Court of Federal Claims holding that (1) precedent foreclosed Plaintiffs' claims that, as implemented, the Air Force promotion board system -- under which Plaintiffs did not obtain a promotion in rank and thus had to separate from the military -- violates 10 U.S.C. §§ 616(c), 617(a); and (2) the promotion board system also does not violate other governing statutes and regulations, including 10 U.S.C. §§ 611(a), 612(a)(1), 613, 615(a)(3), 618(f) and 621. Campa v. United States, 50 Fed. Cl. 300, 303-05 (2001).

On appeal, Campa focuses on 10 U.S.C. §§ 616(c) and 617(a) only, arguing that the trial court erroneously likened his case to binding precedent and that both these statutes require a *knowing* approval and certification by at least a majority of the promotion board members, not just those members whose smaller panel happened to review, score and recommend a particular officer for promotion. Because our decision in Small v. United States, 158 F.3d 576, 580-81 (Fed. Cir. 1998) squarely rejected any requirement that a majority of board members have personal knowledge of those selected for promotion, we affirm.

I

We do not and need not recount at length the procedures employed by the Air Force promotion boards, the specifics of which our court has detailed in Small, 158 F.3d at 578-79, and other recent precedents. For purposes of this appeal, we need only recite that, in its discretion, the Air Force has promulgated regulations that divide each convening promotion board into various, smaller panels. AFR 36-89 (April 1992). Each of the board's panels then scores a proportionate share of the total records of those officers eligible for promotion. Each record is then ranked

according to the total score assigned to it by the panel relative to the other records scored, with the highest scored record being ranked first and so on.

The panels then each apply a proportionate quota to all the records that each panel considered, thereby selecting and recommending for promotion the highest-scoring officers until the panel reaches its promotion quota's cut-off point. The panel also re-scores records that fell into the "gray zone," i.e., those records that had the same total score and were at the cut-off point for promotion. After each panel finally identifies the officers selected and recommended for promotion, a statutorily required written report is compiled. See 10 U.S.C. § 617.

Each board member signs this report, thereby certifying to the Secretary of the Air Force that all the candidates listed therein represent the "best qualified" for promotion. As a result of this process, board members recommend many officers for promotion even though only certain of those members -- namely, the ones on a particular panel -- may have reviewed and scored those particular officers' respective records.

In this case, Plaintiffs are former Air Force officers who were considered under the system described above but did not receive a promotion. Consequently, they allege, they had to involuntarily separate from military service, since a promotion would have otherwise entitled them to continue serving in the Air Force. Plaintiffs seek correction of their military records and back pay.

II

We reject Plaintiffs' claims and uphold the trial court's summary judgment. As that court explained, precedent precludes Plaintiffs' claims that the Air Force's promotion system contravenes the statutory requirements set forth in 10 U.S.C. §§ 616(c), 617(a), as neither provision requires that a majority of board members have personal knowledge of those officers selected and recommended for promotion.

Section 616(c) provides that:

> A selection board convened under section 611(a) of this title may not recommend an officer for promotion unless – (1) the officer receives *the recommendation of a majority of the members of the board*; and (2) a majority of the members of the board *finds* that the officer is fully qualified for promotion.

(Emphases added.) Section 617(a), meanwhile, provides that:

> (a) Each selection board convened under section 611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under section 615 of this title, and (2) that, *in the opinion of a majority of the members of the board*, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned . . . among those officers whose names were furnished to the selection board.

(Emphasis added.) Interpreting these provisions, including the language emphasized above, we held in Small that because the statutes did not address whether the board could divide itself into smaller panels, with each panel reviewing a proportionate share of the total number of records considered, the Air Force could reasonably conduct the promotion board system in this manner. 158 F.3d at 581 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). Moreover, we emphasized that the Air Force could lawfully use these

panels even though, as a result, only one of the board's panels would have reviewed and thus would know about any one of the candidates recommended for promotion:

> The statute *does not require that a majority determination be based on a knowing review and conscientious consideration of each officer's record. Nothing in the plain language of the statute requires first-hand knowledge on the part of the deliberators of an officer's record.* All that is required is a numerical showing that more than half of the board members approved or disapproved of the matter before them. *** In addition, using the signing of the Board Report as a means for the members to both express their approval of the recommended candidates and make the required certification is permissible under the statutory scheme as well.

Id. (emphasis added); accord Fluellen v. United States, 225 F.3d 1298, 1301 (Fed. Cir. 2000) (relying on Small and rejecting claims that 10 U.S.C. §§ 616(c), 617(a) forbid the use of board panels to consider records of the officers eligible for promotion, as opposed to having all the board members review every record); Roane v. United States, 237 F.3d 1352, 1353 (Fed. Cir. 2001) (same).

Notwithstanding this precedent, counsel for Campa and the other Plaintiffs -- the same counsel as in Small, Fluellen and Roane, supra, among others -- insists that the arguments here differ. Specifically, he argues that the evidence in this case, not present in Small, "demonstrates that the 'consensus-by-ratification' theory underlying Small is untenable," thereby rendering Small "factually distinguishable" and "clearly erroneous." (Appellants' Br. at 13.) In support of this theory, Campa points to the deposition testimony and declarations of a board member and an officer assigned to ensure compliance with board procedures, both of whom aver that board members "had no knowledge

whatsoever about a majority of the officers" considered and recommended for promotion. (Id. at 14.) Along these same lines, Campa asserts that the term "certifying," as used in 10 U.S.C. § 617(a), contemplates that a majority of the board members sign and thereby certify the report presented to the Secretary only if they can give a knowing and meaningful assurance about all the officers recommended for promotion. (Id. at 16-18.) As Campa sees it, the Air Force cannot satisfy 10 U.S.C. § 617(a) when board members "merely go through the motions of unknowingly signing their names to what amounts to nothing more than an attendance roster." (Id. at 18.)

We disagree. As explained in Small, nothing in either § 616(c) or § 617(a) bars the Air Force promotion board from using panels to review and select for promotion a proportionate share of the total records under consideration. Further, it matters not that board members have "no knowledge whatsoever about a majority of the officers" recommended for promotion. Put simply, the Small court made it abundantly clear that a majority of the board members need not have knowledge of all the officers recommended for promotion: "The statute does not require that a majority determination be based on a knowing review and conscientious consideration of each officer's record. Nothing in the plain language of the statute requires first-hand knowledge on the part of the deliberators of an officer's record. All that is required is a numerical showing that more than half of the board members approved or disapproved of the matter before them." 158 F.3d at 581.

The same reasoning and precedent preclude Campa's argument about the certification required by section 617(a). Indeed, in Small, we likewise confronted and rejected the argument, essentially parroted by Campa here (Appellants' Br. at 18), that the "current process is no more than an empty ritual" and "that § 617(a) is violated when (a) none of the members know whom they are 'recommending' for promotion and (b) board members affirm their faith in the

selection board process rather than certifying the existence of a majority consensus about the officers who are best qualified for promotion." See 158 F.3d at 580. In short, when the Small court held that nothing in this statute required that a majority of board members have knowledge of all the records recommended for promotion, it was plainly referring to § 616(c) and § 617(a) in their entirety. 158 F.3d at 580-81. Absent a good-faith argument to overturn our prior interpretation of these provisions, neither Plaintiffs nor any future parties suing the government on the same or similar grounds can reasonably assert that any term in § 616(c) or § 617(a) imposes a knowledge requirement.

Last, to the extent that Plaintiffs attempt to undermine the bases underlying Small, it goes without saying that we, a panel, lack the authority to overturn precedent, let alone deem it "clearly erroneous." (Further, we upheld the summary judgment granted in Small, meaning the "clearly erroneous" standard, a standard ordinarily reserved for fact finding, did not apply either there or here. See RCFC 52(a).) As with all parties seeking to overturn the precedent of our court, Plaintiffs would likely need to seek en banc consideration of this issue, see generally Fed. Cir. R. 35(a).

III

For the reasons stated above, we affirm the trial court's grant of summary judgment.

AFFIRMED

THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-279C
August 17, 2001

JOSEPH C. CAMPA, ET AL.,
PLAINTIFFS,
v.
THE UNITED STATES,
DEFENDANT

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Lee J. Freedman, Washington, Dc, with whom was Acting Assistant Attorney General Stuart E. Schiffer, for Defendant. Lt. Col. Bruce Lennard, U.S. Air Force Litigation, Military Personnel Branch, of counsel.

OPINION

James F. Merow, Senior Judge.

This military pay case concerns several former United States Air Force officers that were involuntarily separated from active duty after they were considered but not selected for promotion. The matter is before the Court on defendant's motion to dismiss and plaintiffs' opposition thereto. Plaintiffs contend that the Air Force promotion process violates several applicable statutes and regulations and that therefore their involuntary separation was invalid. Defendant argues that plaintiffs' claims must fail under authority that is binding on this Court. For the reasons stated below, defendant's motion to dismiss is granted.

BACKGROUND

The following facts, which are undisputed, are taken primarily from plaintiffs' First Amended Complaint.

Plaintiffs are 368 former Air Force officers seeking back pay, correction of military records, and other relief for their alleged wrongful separation. Plaintiff Joseph C. Campa ("Campa"), typical of all of the plaintiffs, was considered but not selected for promotion to the grade of lieutenant colonel by the 1991 and 1992 Air Force promotion boards. As a result of this non-selection, Campa was involuntarily separated from the Air Force pursuant to 10 U.S.C § 632.

A. The Air Force Promotion Process

Air Force officers seeking promotion are evaluated against all other officers in the same competitive category. The Air Force defines the "Line" officer competitive category as all officers who are not in the health care fields or members of the Judge Advocate General or Chaplain Corps. Officers seeking promotion in the Line competitive category are reviewed by a selection board consisting of twenty-five or more members. This board is divided into panels consisting of five members each. The records of the candidates are randomly distributed among the panels, and the board's promotion quota is divided among the panels according to the number of records each panel reviews.

Prior to reviewing candidates' records, board members participate in a trial scoring exercise involving ten sample records. This trial exercise, typically completed in one afternoon, is designed to familiarize board members with the records that they will be scoring. Members apply the "whole person standard" when scoring a record, which allows a member to consider any aspect of an officer's record and gives discretion to the member to decide how to weigh each aspect.

A member may award one of nine possible scores to a record: 10.0 Absolutely Superior; 9.5 Outstanding Record; 9.0 Few could be better; 8.5 Strong record; 8.0 Slightly above average; 7.5 Average; 7.0 Slightly below average; 6.5 Well below average; 6.0 Lowest in potential. Unless there is a deviation of at least two points in the scores awarded to a record by two or more panel members, panel members do

not know the score assigned by any other member and there is no discussion between members.

Following the scoring of candidates' records, the Board Secretariat staff enters the scores into a computer database. The computer applies the panel's proportionate promotion quota to the aggregate scores, starting with the highest score and proceeding to the next highest score, and so on. When the quota is exhausted at a score at which there are more candidates than can be accommodated by the panel's promotion quota, the computer designates a group of officers with scores around the cut-off line for re-scoring. This group is designated the "gray zone." Candidates in the "gray zone" are re-scored by the panel until the computer indicates that a cut-off line can be evenly drawn or until the final two records are resolved by the panel.

The Board Secretariat staff then reviews the computer data and reveals to the panel members the identities of the panel's lowest scoring "select" candidate (i.e. the officer with the lowest aggregate score who was within the promotion quota) and highest scoring "non-select" candidate (i.e. the officer with the highest aggregate score who was not within the promotion quota). The panel members vote on whether the highest scoring "non-select" candidate is "fully qualified" for promotion. If so, then the Air Force finds that all candidates with higher scores (all of the "select" candidates) are also "fully qualified" for promotion. The identities of these "select" officers are not revealed to panel members at any time. Board members then sign a blank paper with signature blocks for each board member. After the paper is signed, the Board Secretariat staff attaches a report with certification language and a list of names to the signature page. Each person on this list is deemed to be "recommended" and "fully qualified" for promotion. This document is forwarded to the Secretary of the Air Force as the board's report. Board members are not permitted to see the report or the list of candidates until after the Secretary approves it for public release.

B. Plaintiffs' Complaint

In their First Amended Complaint, filed October 14, 1999, plaintiffs allege that the Air Force promotion system described above violates governing statutes and regulations and that therefore plaintiffs' involuntary separation was invalid. Plaintiffs' primary allegation is that the promotion process fails to meet the minimum procedural requirements of 10 U.S.C. " 616(c) and 617(a). Section 616(c) states that a selection board "may not recommend an officer for promotion unless-(1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members of the board finds that the officer is fully qualified for promotion." Plaintiffs argue that under the Air Force system, board members do not make any "recommendations" and do not find that any officer is "fully qualified."

Section 617(a) requires the selection board to submit a signed, written report certifying that, "in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are best qualified to meet the needs of the armed force concerned." Plaintiffs contend that Air Force selection boards make no certification and no finding that any officer is "best qualified."

Plaintiffs also allege that the Air Force promotion process violates 10 U.S.C. " 611(a), 612(a)(1), 612(a)(3), 613, 615(a)(3), 618(f), and 621, as well as Department of Defense Directive (DoDD) 5025.1 (1994), DoDD 1320.9 (1981) D.1, DoDD 1320.12 (1992) E.2 and F.2, DoDD 1320.12 (1987) G.3 and Air Force Regulation (AFR) 36-89 (1992) && 5(c), 7(a), 14(b)(2) and 14(h)(3).

DISCUSSION

A. Standard of Review

Defendant initially filed a motion to dismiss pursuant to Rule 12(b)(4) of the Rules of the United States Court of Federal Claims ("RCFC"). This motion will be treated as a RCFC 56 motion for summary judgment because matters outside the pleadings are presented to the Court and are not

excluded. *See* Apache Tribe of Mescalero Reservation v. United States, 43 Fed Cl. 155, 170 (1999). Summary judgment is appropriate when there are no genuine disputes over material facts and the moving party is entitled to prevail as a matter of law. RCFC 56(c); *See* Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A genuine dispute concerning a material fact exists when the evidence presented would permit a reasonable jury to find in favor of the non-movant. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Thus, in order to prevail upon a motion for summary judgment, a party must demonstrate that no facts exist which would change the outcome of the litigation under the substantive law governing the suit. *See* id. at 248.

B. Merits

The central dispute in this case is whether Small v. United States, 158 F.3d 576 (Fed. Cir. 1998), amended by 180 F.3d 1343 (Fed. Cir. 1999), cert. denied, 528 U.S. 821 (1999), Fluellen v. United States, 225 F.3d 1298 (Fed. Cir. 2000) and Roane v. United States, 231 F.3d 1348 (Fed. Cir. 2000), amended on reh'g, 237 F.3d 1352 (Fed. Cir. 2001) control and dispose of plaintiffs' claims because they expressly approve the Air Force promotion process. Plaintiffs contend that those cases are factually distinguishable and inapplicable here, while defendant argues that this case fits squarely under their controlling precedent. Plaintiffs have also claimed that the process violates several statutes and regulations that have not been previously raised.

1. Applicability of the Federal Circuit Decisions

In Small, a former Air Force officer challenged the validity of the 1986 and 1987 lieutenant colonel selection boards. The Federal Circuit held that the Air Force promotion system "does not violate the relevant statutory requirements." Small, 158 F.3d at 577. Specifically, the Court held that the Air Force's panel system did result in the majority findings, recommendations and certification

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required by 10 U.S.C. §§ 616(c) and 617(a). Id. at 581. Fluellen presented a similar challenge by a former reserve captain. The Federal Circuit stated that Small disposed of Fluellen's claim that the panel system violated 10 U.S.C. " 616(c) and 617(a). *See* Fluellen, 225 F.3d at 1301. The Court further held that the Air Force promotion system is consistent with DoDD 1320.9 D.1 and 10 U.S.C. § 612(a)(3). *See* id. at 1301-02. In Roane, the Federal Circuit held that Small and Fluellen disposed of plaintiff's claim that the Air Force promotion system violated 10 U.S.C. §§ 616(c) and 617(a) and DoDD 1320.9. 237 F.3d at 1353.

Faced with this adverse authority, plaintiffs vigorously argue that Small is factually distinguishable from the present matter. In essence, plaintiffs' argument is that factual errors in Small render it inapplicable here. Plaintiffs concede that " the procedures *actually* followed by Major Small's promotion boards are substantially the same as the procedures *actually* followed by theirs." Plaintiffs' Surreply at 1-2 (emphasis in original). However, plaintiffs contend that many of the facts concerning the Air Force promotion process as found by the Court in Small are substantially false or incomplete. Because of this inaccuracy, plaintiffs maintain the procedures approved by the Small Court (as well as the Fleuellen and Roane Courts) are not the actual procedures used by the Air Force. According to plaintiffs, whether the actual Air Force promotion process complies with relevant statutory and regulatory requirements is a question that has not been decided.

In support of this argument, plaintiffs cite 28 undisputed facts that they allege " were not the subject of findings in Small or Fluellen or are contrary to findings that were made in those cases." Plaintiffs' Opposition to Defendant's Motion to Dismiss at 11. Although plaintiffs have pled some factual differences, they have not demonstrated that the true Air Force promotion process is materially different from the one described in Small and Fluellen. The majority of these facts are simply intricate

details of the process that the Small and Fluellen Courts chose not to describe. They do not contradict the facts as presented there. Several others are actually plaintiffs' legal arguments mis-characterized as distinguishing facts. Plaintiffs do offer a few factual distinctions. For example, in Small the Court found that the training exercise prior to the scoring of records was designed to establish a uniform scoring standard. 158 F.3d at 578. Plaintiffs allege here that the training exercise is not intended to and does not establish a uniform scoring standard. Plaintiffs further allege that the Fluellen Court incorrectly found that the panel determines the list of candidates to recommend for promotion when it is really the board staff using a computer that applies the promotion quota to the list of aggregate scores. These differences are slight and are insufficient to distinguish this case from Small and Fluellen. Accordingly, plaintiffs' claims that the Air Force promotion process violates 10 U.S.C. 616(c), 617(a) and 612(a)(3) and DoDD 1320.9 fail as a matter of law.

2. Plaintiffs' Remaining Claims

Although the bulk of their argument is directed towards the claims addressed above, plaintiffs also contend that several other statutory and regulatory provisions are violated. After careful review, it is concluded that the Air Force promotion process satisfies all of these provisions. The statutes that plaintiffs claim are violated simply set up the basic framework that governs the promotion system. 10 U.S.C. §§ 611(a) and 612(a)(1) specify the nature and composition of the selection boards. Section 613 requires board members to swear to perform their duties without prejudice. Plaintiffs have not demonstrated that the Air Force system violates these statutes. Section 615(a)(3) requires that information provided to the selection board shall be made available to all board members. Although plaintiffs contend that board members do not actually review each piece of information presented to the board, they have not established that members were denied access to any information they

wished to review. 10 U.S.C. 618(f) prohibits disclosure of board proceedings to any person not a member of the board. Plaintiffs have not argued that board proceedings were improperly disclosed. Finally, 10 U.S.C. § 621 requires that officers in the same competitive category must compete for promotion among themselves. Plaintiffs have not established that officers in different competitive categories competed for promotion.

Plaintiffs devote little argument to their claims of regulatory violations. They have not shown any violation of DoDD 5025.1, which concerns the DoD Directives System. DoDD 1320.12 (1992) E.2(h) repeats the requirement in DoDD 1320.9 (1981) D.1 that separate selection boards shall be convened for each competitive category. Fluellen found that the Air Force promotion system was consistent with DoDD 1320.9, and this reasoning applies to DoDD 1320.12 E.2(h) as well. 225 F.3d at 1301. DoDD 1320.12 (1987) G.3(c), DoDD 1320.12 (1992) E.2(n)(1), and AFR 36-89 (1992) & 5(c) prohibit a person from directing the selection of any candidate or interfering with the independence of the board members. Plaintiffs have not demonstrated a violation of these provisions. DoDD 1320.12 (1992) F.2(a)(2) and AFR 36-89 (1992) & 14(b)(2) require that board members base their recommendations on a candidate's official military record. Plaintiffs have not alleged that material other than official military records was consulted by the board. AFR 36- 89 (1992) & 14(h)(3) requires board members to "remove from the tentative recommended list any officer the board determines is not fully qualified for promotion." Plaintiffs have not alleged that any officer remained on the tentative recommended list in violation of this regulation.

DoDD 1320.12 (1992) E.2 and AFR 36-89 (1992) & 5(c) require the Air Force to issue written procedures to govern the selection boards and to have those procedures approved by the Secretary of Defense and the Secretary of the Air Force. Plaintiffs allege that the Air Force has failed to issue the necessary documents and to obtain the requisite

approval. Neither party has addressed this claim with specificity. Considering that the promotion process satisfies the relevant statutory requirements, plaintiffs have not demonstrated that this failure would entitle them to any relief.

Finally, plaintiffs allege that the promotion process is rife with, or at least susceptible to, misconduct by board members and board staff. For example, plaintiffs contend that board staff members have the ability to secretly alter the select or non-select status of candidates after the board has adjourned. Plaintiffs' vague and unsubstantiated allegations of misconduct are insufficient to override the "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations." LaChance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

CONCLUSION

For the foregoing reasons, it is ORDERED that Defendant's Motion for Summary Judgment is GRANTED. The Clerk is directed to enter judgment for the Defendant. No costs to be assessed.

DECLARATION OF COLONEL KENNETH D. PHELPS, JR., USAF (RET.)

I, Kenneth D. Phelps, Jr., declare as follows:

* * *

5. After my Offutt tour, I was assigned as Director of Personnel Plans, Headquarters, Air Education and Training Command, Randolph Air Force Base, Texas. While there, I served as a scoring member of the Calendar Year 1990 Central Lieutenant Colonel Selection Board. I write to clarify certain facts concerning board member actions during that selection board.

6. The board was divided into autonomous five-member panels and my five-member panel saw only a fraction of records of the line candidates eligible for promotion. The board did complete a trial run exercise as a whole, but its purpose was only to allow board members to experience (review) a sampling of the spectrum of the different qualities of the records of the eligible group. No attempt was made to establish a "standard" of scoring by the board as a whole. Board members simply scored the records provided to them by the Secretariat staff. I

never knew the scores provided by other members, either on my panel or on other panels of the board.

7. I was aware that some records were returned to our panel for rescoring. I believe these were records from other panels that had too large a discrepancy between the high and low scores. I was aware that the Board President and the staff were involved in some sort of quality review process, but I did not know what that process entailed or how this was completed.

8. I was never told which officers were recommended for promotion either by my panel or by any other panel of the board. I vaguely recall that my panel ascertained whether one officer's file (either the highest scoring non-selected record or the lowest-scoring selected record) was "fully qualified" for promotion, but we made no such determination for any other record. I did not know the names of the officers selected for promotion by the board until the list was released some two to three months later.

9. Near the end of the board, I was asked to sign my name to one of several sheets containing signature blocks for all of the board members. I was not told that I was

approving anything since I was given nothing to approve. Nor was I told that I was certifying that the officers recommended were best qualified for promotion since I did not know who those officers were and had never even seen the majority of their records. Instead, to verify that I had been a member of the board, I signed what amounted to an attendance roster, which I was told would be attached to the final board report (which I never saw) for further processing.

Pursuant to 28 U.S.C, § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this ___ day of July, 2001.

_____

Kenneth D. Phelps, Jr.
Colonel, USAF (Retired)

Q.And what does this job entail? What do you do on a daily basis?

A. I'm a trainer of the new officers that arrive in conducting officer promotion boards, enlisted evaluation boards. I monitor their work as they -each recorder is assigned a promotion board, and as they progress through the board I monitor their work, check to be sure it's right. I'm involved in - (Interruption.)

THE WITNESS: -- in the inboard process, watching that it's in compliance with the directives.

Q. (BY MR- FERRANTE) And what were you before? What did you do before 1983?

A. I was in the Air Force doing personnel work through various assignments.

Q. So you had done personnel before?

A. Yes.

Q. Personnel was not new?

A. My entire career 28 years -- nearly 28 years was personnel work.

Q.But was your prior assignment had to do with promotion boards?

A. No,

Q. No. So when you got here in 1983 that was a new -- even though it was personnel it was a new

subject?

A. Exactly.

Q. How did you learn it?

A. One year of training from those who were already here. I was an NCOIC. I was an enilisted person. There were officers who trained me at that point in time. Through the tenure that I've had I've become the corporate knowledge as the other officers have moved on to other assignments.

Q. Okay. And there were no manuals, guides, books or anything that you did? It was all just -

A. Well, you have to realize that the law Title 10 is obviously there to help you board.

Q. Right.

A. DoD directives, instructions, Air Force Regulations at that point in time, now AFIs, Air Force Instructions.

Q. Well, at that point in time they didn't really say anything, though?

A. That's your opinion.

Q. Well, there was nothing in 3689 at that point that told you anything about how the board worked?

A. Not as detailed as it is today.

Q. Right. So you just learned it by what other people told you about this is the way we did it last

year?

A. Uh-huh.

Q. And what about when you -- There's also a staff here with the recorders, and the reporters, and an administrative staff, like, a lot of people are assigned here?

A. Uh-huh.

Q. And they go through training?

A. Uh-huh.

Q. How are they trained?

A. There's a training program that's called for by the DoD directive and the DoD instruction, or an annual training of recorders there's a certified training program. There is a -- just that. Things to read. There's a test administered, and each recorder has to be certified each year.

Q. And when they -- When they start they know nothing, and when they're finished they know how a board works?

A. Nothing better than OTJ.

Q. Right?

A. On-the-job training. So they go through their training phase. Then they observe boards. They're not assigned a board to be prime recorder -primary recorder. And so they observe.

don't do it?

MS. QUILL: Objection. That was a really long question. I think if you restate your question at this point he might be able to answer it.

MR. FERRANTE: I think he can probably answer it now,

MR, FREEDMAN: Objection. Compound. Asked and answered. Vague. Ambiguous. And calls and brings into evidence -- assumes facts not in evidence.

Q. (BY MR. FERRANTE) Do board members do anything other than individually score individual records?

A. No, they do not.

Q. When the process is over, do the members of a panel know who their panel has recommended?

A. With the 01 that was activated and put into being last April of'99, they do. Prior to that time, they did not see a full list.

Q. Did they see a partial list?

A. Well, they see a partial. Through the resolution of the gray they know whether they've -how they've scored those -- how they -whether they've got the five of the ten as the illustration we used earlier.

Q. But they don't know which five -- But they don't know which five of the ten are recommended, do they?

A. They may not. Let me put it that way. They may not know all five names of the -- of the quota they've filled out of the gray.

Q. So in a board that's -- For example, if a panel considered a thousand officers which is probably a reasonably -- a reasonable number, a thousand records per panel?

MS. QUILL: Is that a question?

MR. FERRANTE: Yes.

THE WITNESS: There were times, yes, when a panel had a thousand records to score in the line competitive category.

Q. (BY MR. FERRANTE) Right.

A. Uh-huh.

Q. So what you're saying is that in a panel that considered a thousand records they might know five that were recommended?

A. They might know the name of a few selects, yes.

Q. And how might they -- how -- how might they figure that out?

A. Only through -

Q. When you say "might"?

A. Only through the gray resolution.

Q. But the gray resolution, if I understood what you said before, was the same as the regular scoring; in that, they took the -- they took these records and rescored them meaning that they put a number on a piece of paper and passed it on.

A. Uh-huh.

Q. How would they know what happened to it?

A. Only that, if you're sitting there scoring the records, and you scored some high and some low to differentiate, and there were no splits, you might have some idea of who you scored high out of the ten, and there were no significant disagreements, then you could make an assumption of who would be promoted out of the gray.

Q. Okay. So with a lot of insight you might be able to figure it out -- some of them anyway? MS. QUILL: Objection. Go ahead. THE WITNESS: Some of them.

Q. (BY MR. FERRANTE) So the members of a panel might be able to figure out a few of the officers recommended by each panel, is that -MS. QUILL: Objection.

Q. (BY MR. FERRANTE) Does a member of a panel

know who any other panel has recommended?

MS. QUILL: Objection. To the extent you're asking what any individual knows other than himself.

Q. (BY MR. FERRANTE) Can a member of one panel know who other panels have recommended?

A. Again, with the 01 -

Q. Well, no. Prior to the Ol?

A. No,

Q. Do the members of the board, when it is sitting as a board rather than as individual panels, know who any panel has recommended?

A. Prior to the 01, no.

Q. Do the members of the board know who the board has recommended?

A. Prior to the 01, no.

Q. Okay. Now, I'm not familiar with the 01. Can you just briefly tell us what the 01 does that changes that? What's different as of last year?

A. Provides the -- the select list -- a recommended list to the board members.

Q. To the board members at the end -- not to the panels individually, but to the board?

A. Board is -- the competitive category.

MR. FERRANTE: These questions are

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just -- I'm just trying to understand -- Because I'm not familiar with the 01, so I'm just trying to learn it myself.

Q. (BY MR. FERRANTE) So under the 01 this -the cumulative select list is presented to the members at the end?

A. True.

Q. There's

A. It is.

Q. But it's not done at the panel level?

A. It is done as a board as a whole. You're still sitting at a panel. Does each panel see the entire list, yes.

Q. Okay. That's what I mean.

A. Yes.

Q. Not the panel see -- the panel -- No. Each member sees the whole list, but this is only as of -

A. April of'99.

MR. FREEDMAN: Objection. Compound.

the members. And I just would like you to state that at least up to the date of the new rule of last year, is this accurate?

A. To the best of my knowledge, it was, yes.

Q, That's all I wanted to do. Okay. We've just gone through -- they didn't know members of the board, they didn't know who was being recommended -- Just sort of summarizing where we've dropped off. They didn't know about the POM, did they?

MS. QUILL: I'm sorry. Who didn't know about the POM? Who? When? Where?

Q. (BY MR. FERRANTE) As long -- When the POM existed did the members know it?

A. They were not briefed about it. On occasion others knew of it, have heard of it, and have said are you still using it, we never denied it, and said, yes, it's still a management tool.

Q. But in the normal operations, in the normal course of business, the members were not told about the POM, what it was, what it was used for, or even its existence?

A. As I said, it was not briefed to the board members.

Q. Right. Unless you happened to have one who had been there before or something?

Q. Okay. I got it -- I got you. Okay. Did anybody other than the board president use the POM?

A. The POM working with the computer would generate the records that would go in to the board president. Would my admin staff be responsible for pulling the records off of the shelf to put them on a cart to take them to the board president, yes.

Q. Purely administerial?

A. Yes.

Q. They're just reacting to the computer's reaction to a disconnect between reality and the POM?

A. The board president had the responsibility of making the decision. The records were taken to him.

Q. But the staff never got to say, oh, this one's off but close, we won't do this one; this one's office, but -

A. No.

Q. No. That's what I mean. The board president -

A. Now, the board president made a decision.

Q. Okay. And no one ever usurped that or said -

A. Never.

Q. -- this one's so clear we don't have to

bother?

MS. QUILL: Question. Answer.

MR. FERRANTE: Yeah, I know. Sorry.

Q. (BY MR. FERRANTE) Now, as part of this review process with or without the POM if the board president -- let's say he got one of the ones that you talked about before, either a court martial or a astronaut or whatever, and he sent it back for somebody to -- to review and he -he still wasn't satisfied, what could he do?

A. In theory he could ask for another opinion. In other words, there -- he -- he could go to another panel and ask for another opinion.

Q. And of course since the -- since the members didn't know he was using the POM in the first place the members didn't know -- Did the members know that?

A. Again, now, you remember -- you -- you come back to this POM. The POM would have nothing to do with a record being identified as an astronaut or a court martial. Okay.

Q. 0h right. Okay. I understand.

A. Okay, All right, So the computer program would process the court martial record to him, he would send it out.

Q. Did the members know that there was this

review process with involving astronauts?

A. Only that the -- Only that the board president was asking for a reconsideration -revalidation or a new opinion. Whether they picked up on it as an astronaut record or not, I don't know.

Q. So they only -- Okay.

A. They -

Q. They knew a

A. –just reacted

Q. They knew a record came back, but they didn't know why?

A. True.

Q. And they didn't know that it might have come back two or three times?

MS. QUILL: Objection to what they knew versus what they were told. To the extent that Mr, Clayton can't answer to what they knew.

MR.FERRANTE: Well, he just answered they -

Q. (BY MR. FERRANTE) They were never -- They got a record back but they were not told why, Were they told if a record came back two or three or four times?

A. They were not.

Q. And if it -- if a record was sent back for

anything more than one scoring was the president able to just choose the one he liked?

A. He would choose what seemed to be more in line with his perception of the value -- value the -- the -- what's the right word I'm looking for here -- the score value of the record. Now, let me clarify. If there was a medal of honor winner that was out, a nonselect -- tentatively a nonselect and he sent it back out and another panel might perceive it as a gray-zone record. Has it improved the record, yes. Could the board president take that score, yes. And that was common sense based on how he perceived the quality of the record.

Q. Okay. So he's going to -- What you're saying is, he's going to go with the score that comports with his opinion?

A. Yes.

A. It was a management tool for the board president to use to feel comfortable about the scoring of the record and the quality of the record.

Q. Right. What I'm saying -- Yeah. I think you were distinguishing or -- and I'm -- it sounded to me I like you were distinguishing between using the POM to change the list afterwards versus being part of the process by which you got on the list in the first place. You're not still -- I mean, it -- it was part of the process by which it got there?

A. It was as I said -

Q. Or perhaps didn't get there?

A. Bingo. There you go, sir.

Q. What about this possibility of something might -- might somebody was rescored a bunch of times? Is that

A. I would tell you in theory the board president -- by however many panels were out there, in theory the board president could have rescored a record to various panels to get fresh opinions.

Q. Okay. Well, let's just --so you don't have any specific recollection of this event?

A. I don't. No. Not at all.

Q. Okay. But you don't discount the possibility that it happened?

A. In theory, it could have happened.

Q. Okay. Well, let's assume that it happened, okay, for the sake of discussion. And that we have a five member board -- I mean, a five panel board and this record is rescored four times. That means it was scored by three board -- three panels that, according to you if you read, you know, behind the scene -behind the lines of what -- what is said there -- it was scored three times and didn't score high enough, and then on the fourth panel gave it a high enough score to be selected. That -- Is that the way you read that sentence?

A. Uh-huh. In theor – Yes.

MS. QUILL: That's your hypothetical?

MR. FERRANTE: Yeah. We're assuming that he's -- He can't discount that this happened, so we're just assuming that -- that it's an event that happened.

MR. FREEDMAN: He can't discount that it happened?

MR. FERRANTE; Right.

MS. QUILL: Are you giving him a hypothetical question?

MR. FERRANTE: Based on this.

MS. QUILL: Okay. Based on the

affidavit here.

MR. FERRANTE: We're assuming that what's in this happened.

MS. QUILL: Hypothetically, we'll assume that that happened, and you're asking him a hypothetical question based on those hypothetical facts, correct?

MR. FERRANTE: Right. Based on those hypothetical facts or based on procedures in which that hypothetical was entirely possible.

MS. QUILL: Based on his statement that it was theoretically possible, yes.

MR. FERRANTE: Right. Okay.

Q. (BY MR. FERRANTE) Now, we've got our five panel board. We've got three panels that said it's not good enough to be promoted, you get to the fourth panel that finally said it is good enough, and we haven't heard from panel five.

A. All right.

Q. Under that circumstance how -- it's not fair to say that the result is the result -- that the board members made that decision, didn't they? Because by my count five, ten -- fifteen out of twenty-five members have already registered the opinion that it's not good enough to be promoted?

MS. QUILL: Objection. Have you gotten to your question? I'm sorry.

MR. FERRANTE: I don't know. What's the objection before I go any farther?

MS. QUILL: Because you've had like three in a row now. And I'm not sure what you -- If you're coming to one question -

MR. FERRANTE: Well, I've got to give you the -

MS. QUILL: Okay. Okay.

THE WITNESS: Go ahead.

Q. (BY MR. FERRANTE) If you've got this situation -- we're -- We're in this hypothetical.

A. Okay.

Q. These guys said no. I'm going to --just use common English in this sometimes. These guys said no. These guys said no. These guys said no. These guys said yes. And these haven't expressed an opinion. So fifteen of the members have said no, and three of the members have said yes. This person would be promoted even though fifteen out of twenty-five members have expressed an opinion that said no under that scenario; is that correct?

A. In theory, yes, that is correct.

Q. Well, if that can happen -- or if that

happens, where's the majority, and how could it be said that the ultimate decision is left to the members when in this case it obviously wasn't?

MS. QUILL: Objection as to form, as to restating testimony. But if you can answer, go ahead.

THE WITNESS: No. I -- I really can't. The -- the -- A panel saw it. The quality of the record is such that they scored it and it was a -- in gray or select. The board president, in his assessment of it, felt it was the same way and he chose to go with that, yes.

Q. (BY MR. FERRANTE) Right. But the -- the opinion of the first fifteen doesn't count for anything in that situation?

A. Did not count for anything in that situation -- that scenario.

Q. So that's why I'm saying in the -- in the passages -- I believe it's in your declaration -- and I didn't write it down. But I believe that somewhere in your declaration you said that even though there's a rescoring that the ultimate decision is still left to the members. That wouldn't necessarily be true in this scenario?

MS. QUILL: Object.

Air Force Regulation 36-89 (1981), Chapter 2

2-1. Announcement of the Promotion Program:

a. The promotion of an officer to first lieutenant is made on completion of specified periods of time and service []. Since a board recommendation is not needed, it is not necessary to announce the promotion criteria each year.

b. The promotion of an officer to the grade of captain through colonel requires selection by a central selection board. ... Since the eligibility criteria differs for each competitive category from year to year, HQ AFMPC/MPCJAB specifies exact requirements each time it makes an announcement. As of the date of notification, the names and dates of ranks of the junior and senior officers in the promotion zone will be provided for each competitive category. Additional information will also be provided regarding eligibility for consideration below the promotion zone and above the promotion zone. ...

2-2. Appointment of Boards:

a. The Secretary of the Air Force appoints and convenes central selection boards.

* * *

2-3. Composition of Boards:

a. Selection boards must have a minimum of five officers who are on the active duty list and are serving in a higher grade than the grade of the officers to be considered by the board. All members must be serving in a grade higher than major.

b. No member may serve on two successive boards for the same grade if the second board considers any officer in the same grade and competitive category considered by the previous board.

c. If Reserve of the Air Force officers are considered, the membership of the board must include at least one Reserve officer.

d. Board membership must include at least one officer from each competitive category being considered. ...
e. The president of a board should be serving in a grade equal to or higher than that shown in table 2-1.

2-4. Information Provided to Selection and Nomination Boards:
a. Central Selection Boards Are Provided:

(1) The number of officers in each competitive category to be considered.

(2) The maximum number of officers in each competitive category under consideration that the board may recommend for promotion.

(3) The names of all officers to be considered in each competitive category.

(4) The Officer, HQ USAF Selection Record Group (selection folder) for each officer who is being considered.
...

(5) Information relating to the needs of the Air Force for officers having particular skills.

(6) Any other information and guidance the board may need to properly perform its functions as long as such information is not prohibited by another directive.

* * *

2-5. Letters to Selection Boards:

(a) Letters from a person other than the officer eligible for consideration are not authorized. Also, letters are not permitted for use by nomination boards.

(b) An officer eligible for consideration may send a letter to the board to arrive not later than the date the board convenes. ...

2-6. Whole Person Concept. Board members use the whole person concept to subjectively assess each eligible officer's relative potential to serve in the next higher grade. The whole person concept includes such factors as performance,

leadership, professional competence, breadth of experience, job responsibility, academic and professional education, and specific achievements.

2-7. Oath Administered to Members of Selection and Nomination Boards. Board members must take an oath to perform their duties without prejudice or partiality, having in view both the special fitness of officers and the efficiency of the Air Force.

2-8. Report of Board Proceedings:

a. Each board submits a written report to the Secretary of the Air Force signed by each member. The report certifies that the board carefully considered the records of each officer whose name was provided the board, and that in the opinion of a majority of the members, the officers recommended for promotion are both best qualified and fully qualified to meet the needs of the Air Force.

b. In addition to providing a list of officers recommended for promotion, each selection board will list the names, as appropriate, of all officers considered for promotion whose record, in the opinion of a majority of the board members, indicates that the officers should be required to show cause for retention on active duty. []

2-9. Approval of Board Proceedings:

a. The Secretary of the Air Force acting for the President, is the approval authority for central selection board proceedings.

* * *

2-10. Announcement of Central Selection Board Results. HQ AFMPC/MPCJAB determines when each list will be announced and sends advance copies to [major commands and personnel offices] before the public release date. Public release will not be made until the report of a selection board is approved by the Secretary of the Air Force.

2-11. Disclosure of Board Proceedings:
a. How board members scored on any particular record may not be disclosed (AFR 12-30). However, information on the number of officers considered and selected, how the board was organized, the general procedures it followed, and the number of board members and their grades may be disclosed. Board scores are internal working papers, are exempt from disclosure, and are destroyed as soon as the board proceedings are approved.

* * *

2-12. Notification of officers Selected for Promotion:

a. First Lieutenant. Each officer's commander notifies him or her of the projected effective date, and advises the officer to assume the grade on that date unless otherwise directed. Each officer should be notified at least 30 days before the effective date.

b. All Other Grades. Each officer's commander notifies the officer of his or her selection on the day before the public release date, or as soon afterward as practical. The officer may be notified orally or in writing.

(1) Each officer selected for promotion to captain and each medical and dental corps officer selected for promotion to major and above is advised of the date he or she may assume the higher grade.

(2) All other officers selected for promotion to a grade above captain are advised that they will be promoted when their promotion sequence number is included in the monthly increment announced by HQ AFMPC/MPCAJB.

2-13. Notification of Officers Failed of Selection for Promotion. Each officer's commander notifies the officer of his or her nonselection on the day before the public release date, or as soon thereafter as possible. Officers not selected for promotion to captain, major, or lieutenant

colonel must be notified in writing. Officers not selected for promotion to colonel may be notified orally.

2-14. Active Duty Service Commitment (ADSC). Each officer promoted to major and above (except medical and dental corps officers) incurs a 2-year ADSC beginning on the effective date of the promotion. (See AFR 36-51.) Officers selected for promotion to grades above captain are required to sign a Statement of Understanding (attachment 1) within 5 workdays after public release of the list. The statement acknowledges the 2-year ADSC if the promotion is accepted and affords the selectee the opportunity to indicate his or her intention of accepting or declining the promotion.

2-15. Retirement Grade Restrictions:

a. For promotions resulting from boards held after 14 September 1981, officers must serve 3 years after to effective date of promotion to lieutenant colonel or colonel to qualify for voluntary nondisability retirement in that current grade unless a waiver is granted by the President. Majors must serve 2 years (same as the ADSC) before they can voluntarily retire for nondisability retirement in that grade. ... Officers selected for promotion to grades above captain are required to sign a Statement of Understanding of these retirement restrictions (attachment 1).

b. For promotions resulting from boards held prior to 15 September 1981, officers must serve 2 years after the effective date of promotion to lieutenant colonel or colonel to qualify for voluntary nondisability retirement in that grade unless a waiver is granted by the Secretary of the Air Force.

...

2-16. Declination of Promotion:

a. An officer selected for promotion to a higher grade is considered to have accepted the promotion on the effective date of the promotion unless he or she had taken action to decline it. An officer may decline a promotion at

any time up to 2400 hours of the day before the effective date of promotion. Declinations signed after 2400 hours of the day preceding the effective date will not be accepted.

b. An officer who desires to decline a promotion must sign three copies of a Declination of Promotion Statement (attachment 2) and send all copies to the CBPO.

c. The name of an officer who declines promotion remains on the promotion list.

d. An officer who submits a declination statement and later decides to accept the promotion may withdraw the declination statement.

(1) If the effective date of promotion has not passed, the officer submits a letter to HQ AFMPC/MPCAJB stating that he or she desires to withdraw the declination statement and accept the promotion. Officer will then be promoted as originally scheduled provided sufficient service retainability has been obtained.

(2) If the effective date of promotion has passed, the officer must submit a written request through his or her [major command] to withdraw the declination statement. If all levels of command recommend approval of the request, officer will be promoted with an effective date, DOR, and position on the ADL as of the date the withdrawal request is received at HQ AFMPC/MPCAJB.

2-17. Promotion Sequence:

a. For promotion to captain an officer selected the first time he or she is considered is promoted 24 months after his or her DOR as a first lieutenant. An officer, selected the second or a subsequent time he or she is considered, is promoted on the first day in which promotions are made from the promotion list that contains the officer's name.

b. Each officer, other than medical or dental corps, on a recommended list to major or above will have his or her name placed on a single promotion list for that competitive category in order of seniority (see paragraph 1-3c). Subject to senate confirmation and established grade ceilings officers

on a promotion list will be promoted when additional officers in that grade and competitive category are needed. Officers are promoted in order by promotion sequence number (line number). HQ AFMPC/MPCAJB sends an increment message (MINIMIZE included) to CBPOs each month listing the promotion sequence numbers of officers to be promoted to grades above captain.

c. For promotion of a medical or dental corps officers to a grade above captain:

(1) An officer selected "In-the-Promotion Zone (IPZ)" is promoted effective and with DOR based on the anniversary of the DOR that made him or her eligible for consideration.

(2) An officer selected the second, or a subsequent time he or she is considered (Above-the-Promotion Zone) is promoted with an effective date and DOR prior to those promoted "In-the-Promotion Zone (IPZ)".

(3) An officer selected "Below-the-Promotion Zone (BPZ)" is promoted with an effective date and DOR subsequent to those promoted "In-the-Promotion Zone (IPZ)".

2-18. Promotion Orders. HQ AFMPC/MPCAJB announces each promotion in Department of the Air Force (DAF) orders.

a. Promotion orders are printed from a machine-produced roster and are amended only to correct an error in the last name, SSAN, DOR, or effective date.

b. If an officer on a promotion order dies or separates from the service before the effective date of promotion, the part of the order pertaining to the promotion of that officer is without effect.

c. HQ AFMPC/DAA distributes promotion orders to arrive at the CBPO with 10 days after the effective date. Address a request for missing orders to HQ AFMPC/DAA, Randolph AFB TX 78150, for order published within 2 years

of the date of request. If the orders were published more than 2 years before the date of request, write to HQ AFMPC/MPCDOB, Randolph AFB TX 78150. Include name, SSAN, grade to which promoted, and the order number, if available.

2-19. Posthumous Promotions:

a. A deceased officer may be promoted posthumously. The commander must state that he or she did not initiate and did not plan to initiate a propriety of promotion action against the officer. The officer must have been either:

(1) A second lieutenant eligible for promotion within 3 months, or

(2) A first lieutenant or above who had been recommended for promotion by a selection board.

b. To initiate a posthumous promotion, the immediate commander sends the request and the statement (referenced above) through the CBPO Promotion and Testing Unit to the officer's MAJCOM OR SOA. The MAJCOM or SOA then requests HQ AFMPC/MPCAJB to publish promotion orders. HQ AFMPC/MPCC sends a letter with copies of the orders to the officer's next of kin. No financial entitlements accrue as a result of a posthumous promotion. NOTE: Posthumous promotions should be processed as soon as possible after death. Immediate telephone contact with AFMPC is desired.

2-20. Promotion Ceremonies. Appropriate ceremonies to publicly recognize the importance of changing insignia are encouraged. Such ceremonies will not be held prior to the effective date of promotion. EXCEPTION: Promotion pin-on ceremonies may be held on the last duty day before the effective date of promotion if the effective date falls on Saturday, Sunday, or a holiday. The officer being recognized is to be advised that although the pin-on ceremony is being held early, the promotion does not become effective until the date on the promotion order and

that the early ceremony does not affect the member's pay, seniority, or entitlements. Promotion propriety actions may be initiated subsequent to the early pin-on ceremony but before the effective date of promotion.

Statutory Provisions

10 U.S.C. § 616(c):

A selection board convened under §611(a) of this title may not recommend an officer for promotion unless -
(1) the officer receives the recommendation of a majority of the members of the board; and
(2) a majority of the members of the board finds that the officer is fully qualified for promotion.

10 U.S.C. § 617(a):

Each selection board convened under §611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under §615 of this title, and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned among those officers whose names were furnished to the selection board.